A **BIING HAN ENTERPRISE SDN BHD**

v.

SIEW LEONG

B COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
KANG HWEE GEE JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: W-02-1105-2007]
C 26 JANUARY 2011

CONTRACT: *Agency - Termination - Loss of earnings - Compensation payable if termination without sufficient cause - Commission payable - Variation of commission - Whether best evidence would be previous year's*
D *commissions - Award of compensation - Whether varied - Contracts Act 1950, ss. 158 & 159*

AGENCY: *Termination - Compensation - Claim for - Compensation payable if termination without sufficient cause - Commission payable - Variation of commission - Whether best evidence would be previous year's*
E *commissions - Award of compensation - Whether varied - Contracts Act 1950, ss. 158 & 159*

The appellant was a direct selling company and the respondent was its distributor manager until differences arose in early 2001
F and the appellant terminated the respondent's services. The respondent's counter claim was based upon the complaint that the respondent's 'dealership' with the appellant was wrongfully terminated and with the respondent's downlines being transferred to the appellant, the respondent had suffered loss. The High
G Court had ordered, *inter alia*, that the appellant pay the respondent the commission that should be paid by the appellant to the respondent. The appellant appealed against the decision of the High Court in favour of the counter claim by the respondent.

H **Held (allowing the appeal in part)**
Per Abdul Wahab Patail JCA delivering the judgment of the court:

I **(1)** Sections 158 and 159 of the Contracts Act 1950 concern principals and agents, agency and commissions. The nature of damage suffered upon an earlier revocation or termination is the loss of earnings until another employment, principal or agent is found. The words 'such revocation or renunciation'

in s. 159 necessarily requires it to be read conjunctively with s. 158. The effect of reading s. 158 together with s. 159 is that not only notice must be given, but it must be reasonable notice of such revocation or termination, to be given so that there is no damage resulting to the other party. These two sections preclude the agent from a claim to compensation for the remaining part of the term and the principal to a claim for compensation likewise. Since ss. 158 and 159 do not apply where there is no fixed term, a demand for payment of reasonable compensation was not precluded. (paras 13 & 14)

(2) What the respondent would have earned in 2001, if he was able to continue, was what he would have lost in 2001. It was not capable of direct determination. The commissions varied from year to year in the previous years. Averaging the figure was as unsatisfactory as a statistical projection, as no details would enlighten us as to the reasons for variations were placed before the court. The best evidence in the circumstances was the previous year's commissions. Accordingly, the appeal was allowed in part in that the award of compensation was varied to a period of six months on the basis of commission earned for the year 2000 with interest at 8% per annum. (paras 17-19)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah syarikat jualan langsung dan responden adalah pengurus pengedar sehingga perbalahan telah berlaku pada awal tahun 2001 dan perayu telah membatalkan perkhidmatan responden. Tuntutan balas responden berdasarkan atas aduan bahawa 'perniagaan' responden dengan perayu telah ditamatkan perkhidmatan dengan cara tidak sah dan dengan pengedar bawahan responden dipindah ke perayu, responden telah mengalami kerugian. Mahkamah Tinggi telah membuat perintah, antara lain, bahawa perayu membayar responden komisyen yang harus dibayarnya kepada responden. Perayu membuat rayuan terhadap keputusan Mahkamah Tinggi yang telah memihak kepada tuntutan balas responden.

Diputuskan (membenarkan rayuan sebahagiannya)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Seksyen-seksyen 158 dan 159 Akta Kontrak 1950 menyentuh pengetua-pengetua dan ejen-ejen, agensi dan suruhanjaya-suruhanjaya. Sifat kerugian yang dialami atas satu pembatalan

atau penamatan adalah kerugian pendapatan sehingga mendapati pekerjaan di tempat lain, pengetua lain atau ejen lain ditemui. Perkataan-perkataan 'pembatalan atau pelepasan sedemikian' dalam s. 159 perlu dibaca bersama-sama dengan s. 158. Kesan membaca s. 158 bersama-sama dengan s. 159 adalah bukan sahaja notis harus diberi, tetapi ia mestilah notis yang munasabah mengenai pembatalan atau penamatan, diberi supaya tidak terdapat kerugian yang dialami oleh pihak tertentu. Kedua-dua seksyen ini menghalangi ejen dari menuntut gantirugi bagi bahagian penggal yang tertinggal dan pengetua bagi suatu tuntutan pampasan yang sama. Oleh kerana ss. 158 dan 159 tidak digunapakai di mana tidak terdapat kontrak satu tempoh yang ditetapkan, permintaan untuk bayaran gantirugi yang munasabah tidak dihalangi.

(2) Apa yang responden akan perolehi pada tahun 2001, jikalau beliau dibenarkan menyambung perkhidmatannya, adalah apa yang beliau rugi pada tahun 2001. Ia tidak boleh diputuskan secara langsung. Komisyen-komisyen berubah dari tahun ke tahun dalam tahun-tahun sebelumnya. Memuratakan angka adalah tidak memuaskan sama seperti unjuran statistik, sebab tiada butir-butir akan menjelaskan sebab-sebab untuk variasi-variasi dikemukakan di hadapan mahkamah. Keterangan terbaik dalam keadaan ini adalah komisyen-komisyen tahun sebelumnya. Oleh sebab itu, rayuan dibenarkan sebahagiannya di mana award pampasan diubah ke tempoh enam bulan berdasarkan komisyen-komisyen yang diperolehi bagi tahun 2000 dengan faedah pada 8% setahun.

Case(s) referred to:
American International Assurance Company Ltd v. Koh Yen Bee [2002] 4 CLJ 49 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 158, 159

For the appellant - Jeyanthi Kali Dass; M/s Swan & Partners
For the respondent - Patrick Dass (Chan Chew Weng with him); M/s Patrick Dass & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-23-44-2002]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appeal by Biing Han Enterprise Sdn Bhd is against the decision of the High Court in favour of the counter-claim by the respondent Siew Leong. The High Court had ordered:

1. Plaintif membayar segala komisyen yang harus dibayar oleh Plaintif kepada Defendan;

2. Plaintif mengemukakan satu akaun mengenai segala komisyen yang harus dibayar oleh Plaintif kepada Defendan;

3. Defendan diberi faedah pada kadar 8% setahun dari tarikh komisyen yang harus dibayar sehingga tarikh penjelasan penuh;

4. Plaintif hendaklah membayar kos kepada Defendan.

Background

[2] The appellant is a direct selling company. It appointed the respondent in August 1994 and promoted the respondent in June 1996 as distributor manager. Differences arose in early 2001. On 10 May 2001, the respondent wrote a complaint to the Ministry of Domestic Trade & Consumer Affairs. By its solicitors' letter dated 25 May 2001, the appellant terminated the respondent's services. A notice of demand by a letter bearing the same date and referring to the respondent's letter to the Ministry demanded as follows:

(a) You are to provide our client a written undertaking to the effect that there shall be no further publication of similar contents concerning our client to others at large;

(b) You do pay to our client a proper and reasonable sum as damages for the injury to our client's reputation and for the embarrassment and distress caused to our client. We await your reasonable offer;

(c) You do provide an apology to our client; and

(d) You do bear the cost arising out of or incidental to the issuance of this letter of demand.

Take Notice that in the event that the above demands are not complied with, we have our client's Strict instructions to initiate legal action against you which we deem necessary to protect our client's interest including but not limited to an action for

A defamation and injunctive relief in which case all costs and expenses incurred thereby shall be solely borne by you. Further, for the avoidance of doubt, our client reserves its rights.

[3] A writ of summons for defamation was issued on 3 September 2001 against the respondent. The respondent filed a B defence and counter-claim. The appellant withdrew its writ before the trial commenced. The trial proceeded on the respondent's counter-claim.

The Counter-Claim

C

[4] The counter-claim was based upon the complaint that the respondent's 'dealership' with the appellant was wrongfully terminated and with the respondent's downlines being transferred to the appellant, the respondent suffered loss.

D

[5] The primary issue was whether the termination was wrongful.

Grounds Of Appeal

E **[6]** Although eleven grounds of appeal were set out in the Memorandum of Appeal, counsel for the appellant told this court that their appeal was basically the application of *American International Assurance Company Ltd v. Koh Yen Bee* [2002] 4 CLJ 49 CA on ss. 158 and 159 of the Contracts Act 1950.

F

[7] After hearing submissions for the parties, we allowed the appeal in part in that the award of compensation is varied to a period of six months on the basis of commission earned for the year 2000 with interest at 8% per annum.

G **Reasons**

[8] It is quite clear from the Record of Appeal that there was no evidence of any written contract. Indeed, the respondent's complaint was that the appellant refused to sign a distributor's H agreement. The appellant did not deny there were dealings between the parties. Indeed, the appellant had asserted as to the responsibilities and duties of the respondent in its multi-level scheme as distributor and the mutually agreed terms and or duties on the part of the respondent, and had sought to justify its I termination on the respondent's failure to his downlines. However, there is by conduct of the parties a contract although there is no fixed term. And neither party has claimed that there is any fixed term.

[9] Sections 158 and 159 read as follows: A

> 158. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause. B
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> 159. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other. C

[10] It is trite the compensation is payable only if the revocation or termination is without sufficient cause. In this regard, we find that the learned judge had dealt with the issues raised before her, and having considered the written submissions before us as well as the written submissions put before the High Court, we are not persuaded that there is any error in this part of her finding that would warrant interference. D

[11] Nothing in ss. 158 and 159 require a written agreement. The difference between the majority and the minority decisions in E
American International Assurance Co Ltd v. Koh Yen Bee with regard to ss. 158 and 159 is that the words "previous revocation or renunciation of the agency" means there must be a fixed term in the first place. The minority held that by reason of the word 'any' the period of time need not necessarily be for a fixed or definite F
term only. An examination of the facts show the real reason for difference is because the minority accepted the contract was annual. The majority on the other hand held:

> We are unable to find any indication that the contract is meant to be for any fixed period of time, be it for one year or whatever. The only indication, perhaps, is that the schedule of commissions is to be signed annually. But that schedule of commissions only fixes the rate of commissions payable during the period of the schedule's subsistence. That schedule of commissions itself is subject to revocation or change and to the terms and conditions of the agents' contract. G H

[12] Neither party had claimed there was any fixed term. The relevant question is what happens when there is no fixed term and ss. 158 and 159 of the Contracts Act 1950 are not applicable? To answer this question, it is necessary to understand ss. 158 and 159. I

[13] These two sections concern principals and agents, agency and commissions. The nature of damage suffered upon an earlier revocation or termination is the loss of earnings until another employment, principal or agent is found. The words "such revocation or renunciation" in s. 159 necessarily requires it to be read conjunctively with s. 158. The effect of reading s. 158 together with s. 159 is that not only notice must be given, but it must be reasonable notice of such revocation or termination, to be given so that there is no damage resulting to the other party. What is reasonable in one case may be different from another. These two sections preclude the agent from a claim to compensation for the remaining part of the term and the principal to a claim for compensation likewise. Reasonable notice thus precludes payment of compensation by one party to the other.

[14] Since ss. 158 and 159 do not apply where there is no fixed term, a demand for payment of reasonable compensation is not precluded. The termination by the appellant's solicitor's letter dated 25 May 2001 was with immediate effect.

[15] Although from the foregoing it may be surmised that we hold that the learned judge had erred, we clarify that it is only in part. It is not sufficient for an appellant merely to persuade the appellate court that the learned judge had erred. To persuade this court to interfere, it is necessary to show that the error materially led the judge to a decision or conclusion she would otherwise not have made. From the foregoing, it is clear we do not disagree with the finding as to liability.

[16] The learned judge had also, in our view, correctly refused to enter judgment for the sum of RM1,305,586.40, but confined her orders to the prayers sought in the counter-claim. The orders were not so much vague or unclear, but in our view, fail to bring expeditious and economical disposal of the case. Implementing the order means paying for more lawyer's and litigation time, and delays closure. The learned judge should have considered a more direct disposal. We do so now.

[17] What the respondent would have earned in 2001, if he was able to continue, is what he would have lost in 2001. It is not capable of direct determination. The commissions varied from year to year in the previous years. Averaging the figure is as

unsatisfactory as a statistical projection, because no details as would enlighten us as to the reasons for variations were placed before the court. We hold that the best evidence in the circumstances is the previous year's commissions.

[18] We considered the submission that three months was a reasonable time. Upon consideration, we think that the usual three months is for common products. The ginseng product is not the usual common product. We hold that six months is appropriate.

[19] Accordingly, we allowed the appeal in part in that the award of compensation is varied to a period of six months on the basis of commission earned for the year 2000 with interest at 8% per annum. We ordered that each party bears its own costs.